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IN THE

Supreme Court of The United States

October Term, 1973

No. 73-1717

WALTER E. FRITZ and
RAMONA J. FRITZ,

Petitioners,

v.

THE TOWN OF CLERMONT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

Supreme Court of The United States

October Term, 1973

No. ————

WALTER E. FRITZ and
RAMONA J. FRITZ,

Petitioners,

v.

THE TOWN OF CLERMONT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The Petitioners, Walter E. Fritz and Ramona J. Fritz, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in this proceeding on February 19, 1974.

OPINION BELOW

The opinion of the Court of Appeals of Indiana (App. A of Petition) is reported at 292 NE 2d 258. The Supreme Court of Indiana denied a petition to transfer without opinion.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on February 7, 1973. A timely petition for rehearing was denied on March 21, 1973. The Petition To Transfer to the Supreme Court of Indiana was denied February 19, 1974. This Petition For Certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Whether a local assessment against the Petitioners' land was valid for the construction of a sewer which did not confer any special benefits to their land because they were already served by a better, pre-existing sewer, for which they had given valuable consideration.

2. Whether the petitioning landowners were deprived of their property without due process of law when the municipality assessed their land without making any determination of benefits to it.

3. Whether the state authorities acted arbitrarily in upholding the acts of the municipality in imposing the special assessment upon the Petitioners' land without determining that special benefits would accrue to the land assessed.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment 14, Section I which reads

> ". . . All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1963 the Petitioners acquired a tract of land in the Town of Clermont, Indiana.

In 1967 and early 1968, in exchange and in consideration for an easement, the Indianapolis Sanitary District built an interceptor sewer across the Petitioners' land and granted them rights to several connections adequate to serve all of their land. In April of 1968 the Petitioners made their first hookup to the sewer.

In February of 1968 the Town's governing Board of Trustees called a public meeting to launch the Town's own sewer project. At this meeting the Board resolved to include in the Town sewer project all land within the Town boundaries.

The Petitioners received no notice of this meeting, and did not attend.

In May of 1968 the Town Board convened its second public meeting to determine assessments. The land of the Petitioners was included in the assessment.

The Petitioners received no notice of that meeting, and did not attend.

In the middle of June, 1968 the Petitioners first learned of their assessment when they received a written notice thereof.

The Petitioners paid their assessment—almost $18,000—under protest and attacked the assessment for want of notice. The Indiana Supreme Court found that the assessment was made without legal or actual notice of the hearing to determine assessments and remanded to the Trial Court, which then held the assessment of the Petitioners' tract null and void. *Fritz v. Board of Trustees of Town of Clermont* (1969) 252 NE 2d 567.

On January 20, 1970—after the Trial Court had voided the assessment of the Petitioners' land—the Town, upon personal notice to the Petitioners, convened a meeting to hear the Petitioners' remonstrance. By that time, the Town sewer had been completed. The remonstrance explicitly protested the assessment on the basis that the pre-existing sewer across the Petitioners' land was adequate and therefore the Town sewer did not benefit them or their land within the meaning of the law.

After the reading of the remonstrance, the Town attorney advised the Board that it could rescind, modify or confirm the prior void assessment. The Board voted to confirm the prior assessment—to the exact penny. The minutes do not show any Board discussion before this vote. No other citizen of the Town was admitted to the hearing.

Before voting, the Board had full knowledge of the pre-existence and location of the Indianapolis Sanitary District interceptor sewer crossing the Petitioners' land, and also had full knowledge that the Petitioners had hooked

up to the interceptor sewer 21 months earlier and were being adequately served thereby.

The respondent Town's assessment of each tract and parcel within its boundaries had been reached by multiplying the square footage of each by a constant factor. The Town Board had failed to exclude the Petitioners' land from its assessment although knowing that the Petitioners' land was already being served by the pre-existing sewer. And the Town Board in its January 20, 1970 "hearing" simply "confirmed" its original void assessment of the Petitioners' land without reaching any determination of benefits or the exclusion of the Petitioners' land.

Only a small minority of the town's property owners had connection rights to the pre-existing interceptor sewer.

On January 27, 1970 the Petitioners filed their complaint in the County Court setting forth the facts summarized above and requesting that the assessment be declared null and void. The Petitioners specifically pointed out that their land did not receive any special benefits from the Town sewer and that their land should have been excluded from the local assessment.

Both sides produced witnesses. No witness testified that benefits would accrue to the Petitioners' land. On the other hand the Petitioner Fritz and the Indianapolis Sanitary District representative, Harlan Moore, testified that no benefits would accrue to the Petitioners' land. The testimony showed that the Town never made any determination of benefits as to the Petitioners' land.

The County Court affirmed the Town assessment. The Petitioners thereafter filed a Motion To Correct Errors setting forth various errors of law including the charge

that the Town's acts were arbitrary and the Petitioners' rights under the 14th Amendment of the U. S. Constituion were being violated.

The Motion To Correct Errors was denied and the Petitioners appealed to the Court of Appeals of Indiana. There, they assigned the same errors. The Court of Appeals affirmed the lower Court and a timely Petition For Rehearing was denied. A Petition To Transfer To The Supreme Court of Indiana was also denied, without opinion.

SUMMARY OF ARGUMENT

The Petitioners had a pre-existing sewer adequately serving all of their land, and they had no use for the additional Town sewer subsequently constructed. The Town knew that fact. Therefore, the Petitioners' tract should have been excluded from the tracts and parcels assessed for the Town sewer.

Nevertheless, the Town Board included their tract among those assessed, but made no determination of benefits to it. The truth is, no benefits accrued to their tract.

In failing to exclude the land of the Petitioners, and also in imposing the assessment upon their land without determining benefits to that land, the respondent Town acted arbitrarily and capriciously; and deprived the Petitioners of their property without due process of law and just compensation.

a burden, or make it especially adapted to a purpose which enhances its value.

"'. . . it is not necessary that the benefits be direct and immediate to justify an assessment. Future possibilities, if any, as well as collateral or indirect benefits, may be considered.' 10 I.L.E., Ditches and Drains, pp. 503, 504. *Cleveland, C., C. & St.L.Ry. Co. v. Mumford* (1935), 208 Ind. 655, 197 N.E. 826; *Watson v. Armstrong* (1913), 180 Ind. 49, 102 N.E. 273; * * *."

A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of appellants are less than the amount assessed. Appellants merely argue that the failure of the Board to consider the effect of the pre-existing sanitary sewer makes the assessment contrary to law. Admittedly, the fact that a parcel of land is receiving sewer service from another source emits an inference that the special benefits to the parcel *may* be less than the benefits flowing to other parcels of land. However, that inference, standing alone, does not show that the improvement does not invoke special benefits on the property in question in an amount equal to, or in excess of, the assessment.

While this is a case of first impression in Indiana, the case of *Brewster-Mill Park Rlty. v. Town Bd. of North Elba* (1962), 17 A.D. 2d 467, 235 N.Y.S. 2d 931, is factually similar. In that case the Town of North Elba attempted to construct a sewer district designated as the Fawn-Ridge Sewer District which included the restaurant of the appellants. The restaurant had been served for a number of years by a main trunk sewer line of another sewer district which passed under the restaurant en route to the disposal facilities. The trial court, in effect, held that the restaurant was not benefited by the proposed improvement. In revers-

ing the judgment of the trial court the reviewing court, at 932-933 of 235 N.Y.S. 2d, stated:

> " 'Whether or not a particular parcel of land has been benefited by a particular improvement is ordinarily a question of fact. The test is not whether as now used by its present owner any advantage is received, but whether its general value has been enhanced. [Citing authorities.] Unless we can say as a matter of law that the improvement may not by any possibility increase the value of respondent's property we must accede to the determination of the Town Board * * *.'
>
> * * * * *
>
> "The fact that respondent already has privately arranged to provide itself with adequate facilities is not controlling." [Citing authorities.]

The evidence contained in the record before us is uncontroverted that the area assessment against the property of Walter E. Fritz and Ramona J. Fritz was based only on the result of the multiplication of the amount of square footage within the Fritz' property by a cost per square foot of the entire assessment area. This computation was properly considered the primary assessment against the Fritz' land. Section 48-3958, *supra*.

It is not the function of this court to weigh the evidence and determine the value of the special benefits accruing to the Fritz' property by reason of the improvement. The Fritzes failed to show that their property is not specially benefited in the amounts assessed. In challenging the primary assessment contained in the assessment roll, the burden was upon the Fritzes to show the special benefits to their land were less than the amount assessed. Section 48-3958, *supra*. They failed to satisfy this burden.

In their proposition four, appellants contend that their land should have been excluded from the assessment area.

The determination of whether the boundaries of the proposed assessment area are proper *vel non* is to be made in the hearing conducted pursuant to § 48-3951, *supra*. Our Supreme Court in *Fritz v. Bd. of Trustees, supra,* distinguished between the two types of hearings in proceedings of this character. In the type of hearing prescribed by § 48-3951, *supra,* the court stated that a notice of a general nature to the public in general would seem to suffice. (at 211 of 253 Ind., at 571 of 252 N.E. 2d.)

Here, appellants-Fritzes did not appear to remonstrate against the proposed boundaries of the assessment area. Moreover, where it cannot be said as a matter of law that a special parcel of land is not specially benefited, it cannot be said that the land should have been excluded from the assessment area.

Appellants argue that they were entitled to specific determinations that the special benefits were equal to the amounts assessed.

The terms "special benefits" elude concrete definition. They may only be explained by reference to other anomalous concepts. See: *Indiana v. City of Indianapolis, supra,* and cases there cited. In enacting Acts 1967, ch. 128, the Legislature did not require a dollar and cents determination to be made of the amount of special benefits flowing to each parcel of land. Instead, § 48-3951, *supra,* merely requires a determination that the special benefits to the several parcels of land within the area be equal to the estimated cost of the improvement. Section 48-3958, *supra,* merely requires that the assessment roll shall have *as the special benefit* to each parcel of land the primary assess-

ment against the parcel determined under § 48-3957, *supra*. These provisions were followed by the Board in the instant case.

Finding no reversible error, the judgment of the trial court is affirmed.

Affirmed.

SHARP AND STATON, JJ. CONCUR.

ARGUMENT

I

THE TOWN SEWER DID NOT CONFER A SPECIAL BENEFIT TO THE LAND OF THE PETITIONERS, WHICH WAS ALREADY ADEQUATELY SERVED BY PRE-EXISTING NEW INTERCEPTOR SEWER

When land is included within the boundaries of a municipal drainage district for drainage from which it cannot be benefited, an assessment on this land for a proportionate cost of drainage is a deprivation of property without due process of law. *Myles Salt Co. v. Iberia Drainage Dist.* (1916) 239 U.S. 478.

It bears repeating that the Petitioners had contractual rights to a number of hookups to the Indianapolis Sanitary District interceptor sewer—and that the Petitioners had made their first hookup—before the respondent Town constructed its own sewer.

And there can be no doubt that the Indianapolis Sanitary District's interceptor sewer was completed and adequately serving the land of the Petitioners before the Town made its purported assessment against their land, and before it started construction of the Town sewer.

Of utmost significance is the fact that before "confirming" its prior void assessment of the Petitioners' tract, the Town Board had full knowledge of the adequacy and use being made of the Indianapolis Sanitary District's interceptor sewer by these Petitioners.

This knowledge transmutes the act of the Town into an arbitrary and capricious deprivation of substantial property without due process of law or just compensation.

Without any special benefits, the Petitioners received absolutely no compensation for the property taken.

II

WITHOUT A LAWFUL DETERMINATION OF SPECIAL BENEFITS TO THE PETITIONERS' LAND, THE RESPONDENT TOWN COULD NOT LAWFULLY MAKE ANY ASSESSMENT UPON THEIR LAND

Without a determination of special benefits, a special assessment is the taking of private property without just compensation and, therefore, violates the requirement for due process of law. *Norwood v. Baker* (1898) 172 U.S. 269.

Admittedly, the Town Board made no determination of benefits to the Petitioners' tract. A member of the Town Board responded to the following question with this answer

"Q. You made no determination as to benefits?

"A. That is right."

There was no contrary testimony.

As stated in *Norwood v. Baker,* supra, a special assessment is illegal if it rests upon a basis that excludes any consideration of benefits. That decision still stands.

As the testimony of the case points out, the Petitioners' contention that their tract would receive no benefit from the Town sewer was undisputed. Every witness on the

issue of benefits either testified that they were not considered or that they would not accrue to the Petitioners' land.

Hence, with no benefits determined and no benefits accruing, the case falls squarely within the rule of *Norwood v. Baker,* supra.

III

FROM THE OUTSET OF THE MATTER, THE ACTS OF THE LOCAL AND STATE AUTHORITIES WERE ARBITRARY AND CONSTITUTED A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE PETITIONERS' CONSTITUTIONAL RIGHTS

As this Court has frequently declared, it will interfere with an assessment on the ground of violation of constitutional rights secured by the 14th Amendment, when the action of the state authorities is found to be arbitrary or wholly unequal in operation and effect. *Goldsmith v. Pendergast Constr. Co.* (1920) 252 U.S. 427.

The instant case presents a consistent pattern of arbitrary conduct and action starting with the Town Board and running through all the Courts which considered the matter.

After illegally imposing upon the Petitioners' tract an assessment later adjudicated to be null and void, the Board gave the Petitioners on January 20, 1970 their first and only hearing, to which no other citizen was admitted; heard the reading of the remonstrance and the advice of its counsel on the three choices available—to rescind, to modify, or to confirm—and then rubber-stamped its prior

illegal assessment without even discussing the matter before voting.

When the Town at its special meeting on January 20, 1970, gave the Petitioners a so-called hearing, the Town sewer was an accomplished fact. Perhaps this accounts for the perfunctory gesture of compliance with the statute by according the January 20, 1970 hearing. But whatever characterization that meeting merits, there is nothing in the record to indicate a *lawful* determination of whether the *land of the Petitioners* should have been excluded from the sewer district nor does the record show any determination of benefits to their land.

Every Court which considered this case refused all of the testimony on benefits, all of which established that benefits to the Petitioners' land either were not considered or would not accrue. For these Courts to shut their eyes to all the testimony on the crucial issue was indeed a most arbitrary act.

Not only did the Courts act arbitrarily to the great prejudice of the Petitioners, they also closed their eyes to the fact that the action of the Town Board and the sustaining Courts resulted in a wholly unequal operation and effect of the Town's assessment scheme upon the Petitioners. For, as the Statement Of The Case explains, only a small minority of the land owners within the Town were served by the pre-existing sewer; whereas all other property owners had no sewer. Consequently, imposing the same assessment formula upon the Petitioners which was imposed upon the majority of property owners, who had no sewer service, was most oppressive.

The Court of Appeals acted arbitrarily in upholding the lower Court in its own arbitrary findings and conclu-

sions and thus compounded the denial of due process of law in which the Petitioners have suffered.

The Supreme Court of Indiana, in denying the Petition To Transfer, without opinion, forged the last link in the chain of unconstitutional state acts—the denial of due process, the taking of property without compensation, and the pressing upon the Petitioners of an unequal operation and effect of the assessment ordinance.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the judgment of the Supreme Court of Indiana.

Respectfully submitted,

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IN THE

Court of Appeals of Indiana

THIRD DISTRICT

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 1171 A 229
TOWN OF CLERMONT,	)	
Defendant-Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT, ROOM NO. ONE

HONORABLE CHARLES C. DAUGHERTY, JUDGE

HOFFMAN, CHIEF JUDGE.

This appeal is from a judgment of the trial court against the Plaintiffs-appellants Walter E. Fritz and Ramona J. Fritz on their amended complaint appealing a sewer construction assessment. The primary issue here presented is whether a 32.7 acre tract of land already receiving sewer service is specially benefited by the construction of "trunk and main" sewers within a designated assessment area.

The instant appeal turns upon the interpretation to be given to Acts 1967, ch. 128, as found in IC 1971, 19-2-7-1 to 19-2-7-20, Ind. Ann. Stat. §§ 48-3948 to 48-3967 (Burns Cum. Supp. 1972). We will not here set forth each of the

above-named statutes verbatim. Instead, we will merely summarize the relevant portions of the pertinent statutes.

Section 48-3950, *supra,* provides that whenever the board orders the construction of any local sewer the cost of which is to be assessed against property, a hearing must be held on the question as to whether the specific benefit that will accrue to the property to be assessed, the abutting property, will be equal to the estimated cost of the improvement.

Section 48-3951, *supra,* provides that after the hearing the original resolution may be rescinded, confirmed or modified. Whenever any sewer shall be intended to be used for receiving sewage from collateral drains a hearing must be held to determine the question whether the area is properly bounded for drainage, whether other territory should be included, whether any real estate should be excluded therefrom, and whether the special benefits to the several parcels within the area will be equal to the estimated cost of the improvement. Procedure for conducting such hearing is set forth in § 48-3952, *supra.*

Section 48-3954, *supra,* provides that when a sewer is intended only for use by property owners along the line of the street on which it is constructed, then the parcels so abutting shall be assessed primarily for the cost of the improvement and the costs shall be apportioned according to the areas of the abutting lands.

Section 48-3957, *supra,* provides that whenever the sewer shall be intended to receive sewage from collateral sewers then the cost shall be divided as follows: so much of the cost equivalent to the cost of a local sewer (§ 48-3954, *supra*) shall be primarily assessed against the abutting property holders. The excess cost shall be primarily assessed against each parcel of land in the district to be

drained in the proportion that that parcel bears to the total area of the district.

Section 48-3958, *supra,* provides that in making assessments for the construction of any sewer, the board shall make out an assessment roll, with the names of the property owners and description of the property primarily assessed for the sewer.

The assessment roll shall also have the total primary assessment against each parcel as the special benefits accruing to the parcel by reason of the improvement.

A notice must be given stating that the assessment roll, with the names of the owners and descriptions of property to be assessed, with the amount of the primary assessment against each parcel, is on file in the office of the board. The notice must name a day on which the board will hear remonstrances against the amounts assessed and will hear and determine the question as to whether the parcels will be specifically benefited by the improvement in the amounts stated in the roll.

The latter section bears extreme importance to the instant appeal. To repeat what we have said, § 48-3958, *supra,* states, "[i]n making assessments * * * for the construction of any sewer, * * * the board shall, * * * make out an assessment roll, * * *." The assessment roll shall contain the total primary assessment against each parcel of land as the special benefits accruing thereto. See: § 48-3958, *supra.* Thereafter, the board 1) will receive and hear remonstrances against the amounts assessed; and 2) will hear and determine the question as to whether the parcels of land have been, or will be, specially benefited by the improvement in the amounts stated and set forth in the roll.

The foregoing statutes must here be applied to the following facts:

Walter E. Fritz and Ramona J. Fritz are the owners of a parcel of land containing approximately 32.7 acres located within the corporate limits of the Town of Clermont, Indiana. On June 1, 1967, a perpetual easement was granted by Walter E. Fritz and Ramona J. Fritz to the City of Indianapolis, Indiana. Said perpetual easement was duly received for public record by the recorder of Marion County, Indiana, on August 9, 1967. The terms of the perpetual easement provided, *inter alia*, that the grantee-City of Indianapolis could enter upon the described real estate of the grantors for the purpose of constructing, maintaining, and operating a sewer line for collection, carriage, treatment and disposal of the waste, garbage, sewage, storm water and refuse of the City of Indianapolis. The grantors were granted the authority to hook up to the four manholes located on their property.

On January 18, 1968, the Board of Trustees of the Town of Clermont unanimously resolved that a sanitary sewer system be constructed within the Town of Clermont, and that the area to be assessed to pay for the Clermont sanitary sewer system is the corporate boundaries of the Town of Clermont. Notice of such resolution was duly given and a hearing was scheduled for February 5, 1968, to hear remonstrances and to determine whether the special benefits to the land within the area assessed and to the Town would be equal to the estimated cost of the improvement.

At such hearing all interested persons were given an opportunity to be heard and Resolution 1968-2 was passed confirming the prior resolution in all respects. On May 17, 1968, Resolution 1968-3, a primary assessment roll for the construction of the Clermont Sanitary Sewer was re-

ceived by the Board of Trustees and a hearing on the assessment contained in the assessment roll was set for May 31, 1968.

A hearing was held on May 31, 1968; however, the Board of Trustees of the Town of Clermont failed to give sufficient notice of such hearing to the Fritzes as found by our Supreme Court in *Fritz v. Bd. of Trustees* (1969), 253 Ind. 202, 252 N.E. 2d 567.

A subsequent hearing was conducted on January 20, 1970, to hear the remonstrance of Walter E. Fritz and Ramona J. Fritz, appellants herein. At the latter hearing it was resolved that the assessment in the amount of $17,827.44 against Walter E. Fritz and Ramona J. Fritz be confirmed. Pursuant to § 48-3960, *supra*, an appeal was taken to the Marion Superior Court which entered judgment affirming the area assessments against appellants.

Appellants' motion to reconsider and correct errors, timely filed, was overruled, and this appeal followed.

On appeal appellants contend that the judgment of the trial court is contrary to law, and in their briefs argue the following four propositions:

1. The Town sewer did not confer a special benefit to the land of the plaintiffs, which was already adequately served by pre-existing new interceptor sewer.
2. The defendant-Town made no determination of special benefits to the land of the plaintiffs and thereby failed to satisfy the statutory condition precedent to the assessment.
3. Without the accrual and a lawful determination of special benefits to the land of the plaintiffs, the defendant-Town could not lawfully make any assessment upon such land.

4. The defendant-Town should have excluded the land of the plaintiffs from the boundaries of the Town sewer system and in failing to hear and determine whether the land of the plaintiffs should be excluded from the district, the defendant-Town denied the plaintiffs due process of law when it levied its assessment against them.

Inasmuch as propositions one, two and three are closely interrelated, we will combine our consideration of them in the following discussion.

Appellee-Town of Clermont contends that the assessment against Walter E. Fritz and Ramona J. Fritz was valid because it was an "area assessment." Such assessments are provided for under § 48-3957, *supra,* when the proposed sewer is intended to receive sewage from collateral drains.

Appellants do not contend that the apportionment of the cost of the trunk and main sewers is contrary to the provisions of § 48-3957, *supra.* Rather, the thrust of their contention is that the Town failed to consider the special benefits to their land in light of the pre-existing sewer in making the assessment.

The concept of "special benefits" encompassed within the statutes here in question was given lengthy consideration in *Indiano v. City of Indianapolis* (1971), —— Ind. App. ——, 269 N.E. 2d 552, 25 Ind. Dec. 455. *Indiano* relies on *Hubenthal, et al. v. Grain, et al.* (1959), 239 Ind. 646, at 650, 159 N.E. 2d 850, at 852-853, wherein it is stated:

> " ' In determining whether lands are benefited, special benefits only may be considered, and not the general benefits which accrue to the landowner as a member of the community. Benefits are special when they increase the value of the property, relieve it from

II.

IN THE

Appellate Court of Indiana

CAUSE NO. 1171 A 229

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Appellants, (Plaintiffs Below)	)	Appeal from the Marion County Superior Court, Room 1
v.	)	
THE TOWN OF CLERMONT,	)	Honorable Charles C. Daugherty, Judge
Appellee. (Defendant Below)	)	

APPELLANTS' PETITION FOR REHEARING DENIED, WITHOUT OPINION. MARCH 21, 1973.

/s/ GEORGE B. HOFFMAN, JR.
GEORGE B. HOFFMAN, JR.
Chief Judge

III.

IN THE

Supreme Court of Indiana

Appeal from Marion County Superior Court Room 1
Honorable Charles C. Daugherty, Judge

WALTER E. FRITZ and RAMONA J. FRITZ,	)	
Appellants, (Plaintiffs Below)	)	
v.	)	CAUSE NO. 1171 A 229
THE TOWN OF CLERMONT,	)	
Appellee, (Defendant Below)	)	

"Appellants' Petition for Transfer" is hereby DENIED this 19th Day of February, 1974.

All Justices Concur.

/s/ DONALD H. HUNTER
DONALD H. HUNTER
ACTING CHIEF JUSTICE

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v.

THE TOWN OF CLERMONT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

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IN THE

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

Comes now the Respondent Town of Clermont (hereinafter called "Town"), and respectfully prays that the Court deny the Petitioners' request for a Writ of Certiorari to review the judgment of the Court of Appeals of Indiana.

OPINION BELOW

(1) The opinion of the Court of Appeals of Indiana is reported at 292 N.E.2d 258.

(2) A petition for rehearing before the Court of Appeals of Indiana was denied on March 21, 1973, as reported at 292 N.E.2d 258.

(3) The Supreme Court of Indiana denied a petition to transfer this case from the Court of Appeals of Indiana on February 19, 1974.

QUESTION PRESENTED

Whether the fixing of a sewer assessment on Petitioners' property by the Town was palpably arbitrary and a plain abuse of discretion which amounted to a taking of Petitioners' property without due process of law contrary to the United States Constitution Amendment 14, Section I?

STATEMENT OF CASE

I.

Installation of Indianapolis Sanitary District Intercepter Sewer and Town Trunk Sewer Across Petitioners' Property

Respondent Town is an Indiana municipal corporation. The Petitioners, in 1968, owned 32.7 acres of land within the corporate limits of the Town. On June 1, 1967, Petitioners granted to the Indiananpolis Sanitary District (a separate municipal corporation) an easement for the purpose of installing an intercepter sewer across the southernmost portion of Petitioners' 32.7 acres. As a result of granting the easement, Petitioners were permitted to connect onto the Indianapolis sewer. The Petitioners' property was not assessed for the Indianapolis Sanitary District

Sewer. The intercepter sewer of the Indianapolis Sanitary District ran along the southernmost part of the 32.7 acre tract. The Town installed sewers within its corporate limits, including a trunk sewer line which bisected the entire 32.7 acre tract owned by Petitioners. The Petitioners' property at the time of the trial in this cause was being developed as an apartment complex.

II.

Installation of Trunk and Main Sewer Lines by Town

On May 17, 1966, the Stream Pollution Control Board of the State of Indiana ordered the Town to install sanitary sewers within the entire corporate limits of the Town.

On January 18, 1968, the Town passed certain improvement resolutions which provided that all trunk and main sewer lines were to be paid for by an area or district assessment. The area to be assessed was all property within the corporate limits of the Town. After proper notice, a public hearing was held to determine if the area was properly bounded and if the benefits within the area or district would exceed or equal the cost. The Petitioners did not attend this hearing or remonstrate. The boundaries of the area benefited, which included the Petitioners' land, was affirmed at this public hearing and the benefit was found to exceed or equal the cost.

After the area was fixed by the Town, bids were taken on the project. The bids were broken into three categories: (1) cost of trunk sewers, (2) cost of main sewers and (3) cost of local sewer (a local sewer is designed to serve abutting properties while a trunk or main sewer is designed to serve an area larger than the abutting property). The cost of the trunk and main sewers was to be paid for by an area assessment on all property

within the Town, including the Petitioners' property. The cost of local sewers was not included in this assessment nor was the Petitioners' land assessed for local sewers.

Notwithstanding the Petitioners' contention, the *facts* show the area assessment for each parcel in the area (the Town) was computed in exactly the same manner and entered on the final assessment roll in the same manner. The Town Board of Trustees at a hearing, after notice, specifically confirmed the assessment roll and stated in the confirming resolution the special benefits were equal to or exceeded the assessment. After the final assessment roll was confirmed, the Petitioners filed a remonstrance. The Town gave the Petitioners a hearing, and after hearing confirmed the assessment against Petitioners' property.

Petitioners then filed an action in the Superior Court of Marion County, Indiana requesting that the assessment be set aside. After a full trial, *de novo,* the Superior Court of Marion County affirmed the assessment levied by the Town against the Petitioners' land.

The Court of Appeals of Indiana, in a unanimous decision, affirmed the holding of the Superior Court of Marion County in fixing the assessment on Petitioners' land. (*Fritz v. Town of Clermont* (1973) ____Ind. App.____, 292 N.E.2d 258). In their opinion, the Indiana Appellate Court stated:

"Appellants do not contend that the apportionment of the cost of the trunk and main sewers is contrary to the provisions of § 48-3957, *supra.* Rather, the thrust of their contention is that the Town failed to consider the special benefits to their land in light of the pre-existing sewer in making the assessment.

The concept of 'special benefits' encompassed within the statutes here in question was given lengthy consideration in *Indiano v. City of Indianapolis* (1971), ____ Ind. App. ____, 269 N.E. 2d 552, 25 Ind. Dec. 455. *Indiano* relies on *Hubenthal, et al. v.*

Grain, et al. (1959), 239 Ind. 646, at 650, 159 N.E. 2d 850, at 852-853, wherein it is stated:

" 'In determining whether lands are benefited, special benefits only may be considered, and not the general benefits which accrue to the landowner as a member of the community. Benefits are special when they increase the value of the property, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.

" '. . . it is not necessary that the benefits be direct and immediate to justify an assessment. Future possibilities, if any, as well as collateral or indirect benefits, may be considered.' 10 I.L.E., Ditches and Drains, pp. 503, 504. *Cleveland, C., C. & St.L.Ry. Co. v. Mumford* (1935), 208 Ind. 655, 197 N.E. 826; *Watson v. Armstrong* (1913), 180 Ind. 49, 102 N.E. 273; * * *.'

"A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of appellants are less than the amount assessed." 292 N.E. 2d at 261-262.

A petition for rehearing before the Appellate Court of Indiana was denied on March 21, 1973, and likewise a petition to transfer the case to the Supreme Court of Indiana was denied on February 19, 1974.

SUMMARY OF ARGUMENT

(1) The Petitioners failed to comply with Supreme Court Rule 23.1.(f) and thus do not properly raise any federal question.

(2) Both the Town Board of Trustees, and the Superior Court of Marion County, Indiana, (in a trial *de novo*), found, *as a fact,* that the benefits were equal to or exceeded the assessment on Petitioners' property. This finding was affirmed by the Court of Appeals of Indiana, and the Indiana Supreme Court. In levying an assessment, the Town was acting in a legislative

capacity and the Court's review in such a case is limited to a determination of whether the Town's action was palpably arbitrary and a plain abuse of discretion. In this case, the courts found it was not.

(3) The determination of whether benefits were equal to or exceeded the assessment is a factual issue depending on the case. This fact has already been determined by the Indiana courts. This Court should not grant the requested review when the whole of the Petitioners' argument rests on a narrow factual issue already resolved.

ARGUMENT

It should be noted at the outset that the Petitioners failed to comply with United States Supreme Court Rule 23.1.(f) by failing to set forth in the Statement of the Case at what stage of the proceedings the federal question was raised, how it was raised and how it was passed on by the Indiana courts. The Rule requires quotations of specific portions of the record or summaries thereof to show these matters. In the Petitioners' petition, there is no attempt to comply with Rule 23.1.(f) and thus no showing that any federal question was timely and properly raised.

Assuming, *arguendo,* the Petitioners complied with Rule 23.1.(f), the only question raised by the petition for writ of certiorari is whether the fixing of an area sewer assessment on Petitioners' property amounted to the taking of their property without due process of law in violation of the Fourteenth Amendment, Section I of the United States Constitution. All three issues raised by the Petitioners in their petition are interrelated and deal with this one issue. But since the Petitioners have raised three separate issues, this brief will address itself to each issue.

I. *The Board of Trustees of the Town, a trial court and two separate Indiana Appellate tribunals found the benefits exceeded the assessment.* The sole ground of the Petitioners' argument, that the assessment violated the Fourteenth Amendment, is that the installation of the Town's sewer, which bisected their property, did not confer a special benefit since there was another sewer which ran along the southernmost portion of the Petitioners' 32.7 acre tract. Whether or not the Petitioners' land was benefited by the installation of the Town's sewer is a question of fact and the Town Board of Trustees found as a fact the benefits exceeded the assessment. The Superior Court of Marion County, Indiana

(after a trial *de novo*) also found, as a fact, the benefits exceeded the assessment. The Court of Appeals of Indiana, in affirming the trial court stated:

> "A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of the appellants are less than the amount assessed." 292 N.E.2d at 262.

As the Indiana Court of Appeals properly noted, the mere existence of the Indianapolis intercepter sewer crossing a portion of Petitioners' land does *not* preclude any benefit from attaching. The issue of benefits is one of fact which depends on the particular case involved. In this case the facts show the existing intercepter sewer of the Indianapolis Sanitary District served only the southern portion of the Petitioners' land and the trunk line installed by the Town bisected the entire 32.7 acres. Also, the Petitioners, at the time of the trial, were in the process of selling the 32.7 acres for use as an apartment complex.

To argue, as the Petitioners do, that their property received no benefits at all is directly contrary to the facts as found by the Town Board of Trustees, the Superior Court of Marion County and the Court of Appeals of Indiana. There is no factual finding by any court or other agency that the benefits received were less than the assessment, let alone any finding that the land was not benefited at all. Rather, all the facts are to the contrary. The Petitioners' first argument would have this Court make factual findings different than those made by the Trial Court—the trier of facts in the case. This Court has repeatedly indicated it will not review narrow factual questions and, certainly will not upset factual issues previously determined, redetermined, affirmed and reaffirmed.

II. *Findings of Town Board of Trustees, Trial Court and Court of Appeals of Indiana all show there was a finding of special*

benefits. The second question raised by the Petitioners is nothing more than a restatement of the first and, as already indicated above, the Board of Trustees of the Town, the Marion County Superior Court and the Court of Appeals of Indiana all found that the benefits to Petitioners exceeded the sewer assessment. This is all that is required. It is not necessary there be an exact mathematical determination that the benefits are so much in dollars and cents compared to the assessment but only that benefits are equal to or exceed the assessment.

In *Butters v. City of Oakland* (1923) 263 U.S. 162, the plaintiff made an argument similar to Petitioners. This Court stated:

> ". . . We are not impressed with his contention. It is not unreasonable to assume that ordinarily the cost of street grading and paving, within municipalities such as this statute deals with, will not exceed the benefits which the adjoining land owners will receive . . . *the method of assessment provided for is an old and familiar one and embodies a principle too well established to be overturned by the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances.*" (Emphasis added) 263 U.S. at 166.

Also, in *Houck v. Little River Drainage District* (1915) 239 U.S. 254, where the area assessment was 25¢ per acre, this Court had this to say about assessments:

> "When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case *there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, footage, area, market value, or to benefits estimated by commissioners* . . . [cited cases]." 239 U.S. at 265.

Thus, the second argument raised by the Petitioners is the same as the first and asks this Court to review and overturn a narrow factual issue which is limited to the facts of this case.

III. *Act of local and state authorities not arbitrary and did not constitute a denial of due process.* The Petitioners take the somewhat tenuous position that the Town Board of Trustees, the Superior Court of Marion County, the Court of Appeals of Indiana (twice, both at the time of the original hearing and on petition for rehearing) and the Indiana Supreme Court acted arbitrarily in upholding the assessment against the Petitioners' property. The Petitioners must take this position because of the scope of review in a case such as this is limited to a determination of whether the assessment is palpably arbitrary and a plain abuse of discretion. The Town, in fixing the assessment, was exercising a legislative function delegated to it by the Indiana Legislature. *Garvin v. Baussman* (1880) 114 Ind. 429, 16 N.E. 826. In *Houck v. Little River Drainage District* (1915) 239 U.S. 254, this Court noted it will not interfere with the determination of an assessment unless the action is palpably arbitrary and a plain abuse of discretion:

> "The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, *the legislature may itself fix the basis of taxation or assessment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions.* (numerous cites omitted)." 239 U.S. at 262.

There are numerous other such cases including: *Fallbrook Irrigation District v. Bradley* (1896) 164 U.S. 112, 169, where this Court termed the question of fact as to benefits as "a mere question of legislative discretion"; *Bauman v. Ross* (1897) 167 U.S. 548, 590, where this Court noted the "rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature"; *French v. Barber Asphalt Paving Co.* (1901)

181 U.S. 324, 338, where this Court stated: "The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must, of course, be final"; and *Butters v. City of Oakland* (1923) 263 U.S. 162, wherein the plaintiff's argument that the assessment exceeded benefits was rejected in the following fashion:

> ". . . [T]he municipal authorities were empowered to establish the district benefited and to assess the tax in proportion to the benefits. Ample provision is made for a hearing and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or fraudulently. The assessment was reviewed upon appeal by the city counsel . . . *Its action, under the statute, was final and conclusive and it is not open to attack in this proceeding.*" (Emphasis added) 263 U.S. at 164-165.

There is certainly nothing to indicate that any of the tribunals in this case acted arbitrarily or capriciously in affirming the sewer assessment against the Petitioners' land in light of the particular facts in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of The United States

October Term, 1973

No. 73-1717

WALTER E. FRITZ and
RAMONA J. FRITZ,

Petitioners,

v.

THE TOWN OF CLERMONT,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

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PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

The Petitioners, Walter E. Fritz and Ramona J. Fritz, respectfully submit the following brief in reply to the Respondent's opposition to the Petitioners' request for a Writ of Certiorari to review the judgment of the Court of Appeals of Indiana.

The Petitioners take exception with various statements made by the Respondent Town in relating the facts and vigorously oppose the Town's position that the Petitioners failed to comply with United States Supreme Court Rule 23.1(f).

In support of this reply brief, the Petitioners show to the Court:

I.

The Petitioners did not attend or remonstrate to the hearing of January 18, 1968 for the reason that they did not receive notice of the meeting. The facts were uncontradicted that the Petitioners received no actual notice of the hearing even though the Town knew the Petitioners names and address. (*Fritz* v. *Board of Trustees of Town of Clermont* (1969) 252 NE 2d 567 at page 568)

The only notice given of this hearing was by publication and posting.

II.

The Respondent Town's statement that at the time of the trial the Petitioners' property was being developed as an apartment complex is erroneous.

III.

Contrary to the Town's allegations, the Petitioners did comply with United States Supreme Court Rule 23.1(f).

On January 20, 1970 the Petitioners explicitly showed in their remonstrance to the assessment that the Town sewer did not benefit them or their land within the meaning of the law because of the pre-existing sewer across their property. (Petition for Certiorari p. 4)

On January 27, 1970 the Petitioners filed their complaint in the County Court and again explicitly pointed out that their land did not receive any special benefits from the Town sewer and therefore their land should have been excluded from the local assessment. (Petition for Certiorari p. 5)

After the County Court affirmed the County assessment the Petitioners filed a Motion To Correct Errors and set forth the same charges and specifically said that the Petitioners rights under the Fourteenth Amendment of the United States Constitution were being violated. (Petition for Certiorari pp. 5-6)

Upon appeal to the Court of Appeals of Indiana the Petitioners raised the same questions as raised below. (Petition for Certiorari p. 6)

In the Petitioners' Statement of The Case the Petitioners show how the foregoing questions were passed upon by the Indiana Courts.

IV.

Contrary to the Respondent's position the Town never attempted to determine benefits. They simply spread the cost of the proposed sewer over the square footage of land within the Town and called the square footage cost a special benefit. This was the uncontradicted evidence of the Town's own witnesses—

During cross-examination the Town's engineer stated:

"Q. You took that square footage times a certain rate and that was the calculation, is that right?

A. That is right.

Q. What consideration did you give to any benefits, special benefits of any kind, not general benefits but special benefits?

A. I don't believe I understand you.

Q. Did you give any consideration at all in your calculations to any special benefits any of these landowners within the Town of Clermont, might have received or might not be received from the installation of these sewers?

A. No sir.

Q. In other words, your calculations were the square footage times the rate, period?

A. That is right.

Q. That was regardless of whether there was a sewer across their property already or not?

A. That is true."

On cross-examination a member of the Town Board related the following:

"Q. You assessed everybody the same way?

A. That is right.

Q. You took the square footage, took it times the calculation, and that was the assessment?

A. That is right.

Q. You made no determination as to benefits?

A. That is right."

There was no contrary testimony regarding benefits.

V.

The Town's sewer did not bisect all of the Petitioners' property as maintained by the Respondent Town. The

Town sewer entered from the northeast and eventually connected to the interceptor sewer.

CONCLUSION

The Petitioners again respectfully submit that a Writ of Certiorari should be issued to review the judgment of the Court of Appeals of Indiana, Third District.

In failing to exclude the land of the Petitioners and also in imposing the assessment upon their land without determining benefits, the Respondent Town acted arbitrarily, capriciously and deprived the Petitioners of their property without due process of law and just compensation.

Respectfully submitted,

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